SUPREME COURT, U. S.

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In The

Supreme Court of The United States

OCTOBER TERM, 1968

No. 11,584

[redacted] 190

UNITED STATES OF AMERICA,

Respondent

versus

OTHELL CAMPBELL,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ABRAMS, BOWEN AND TOWNES
By: Sol E. Abrams and Thomas W. Greene
Attorneys for Othell Campbell
508 E. North Street
Greenville, South Carolina.

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Othell Campbell, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 20, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this petition.

JURISDICTION

The judgment sought to be reviewed herein was filed on May 20, 1968. This Court's jurisdiction is invoked under 28 U. S. Code § 1254 (1), 28 U. S. Code § 1651, and 28 U. S. Code § 2106.

QUESTIONS PRESENTED

(1) Whether one in his home or only a few feet therefrom in his yard is protected by the Fourth Amendment to the United States Constitution from surveillance by government agents, without an arrest or search warrant, who are hidden on the premises in close proximity to the home.

(2) Whether observations upon which an arrest and conviction are based constitute an unlawful search and seizure in violation of the Fourth Amendment to the United States Constitution when those observations were made by trespassing government agents without a search or arrest warrant who were hidden on the premises of the accused in close proximity to his home for the purpose of observing the accused who was in a position visible only to one so hidden.

(3) Is the "open field" doctrine as applied by the appellate court below the correct basis upon which to determine whether or not an individual in connection with his home and property is entitled to the protection of the Fourth Amendment to the United States Constitution.

(4) Did the appellate Court below in its application of the "open field" doctrine apply an erroneous definition of curtilage to the facts before it.

(5) Has the "open field" doctrine set forth in *Hester v. United States* been replaced or modified by the "freedom from Government intrusion of privacy" doctrine set forth in *Katz v. United States* as the basis for making a determination of whether an individual is entitled to the protection of the Fourth Amendment to the United States Constitution.

STATUTES INVOLVED

The statute involved in this appeal is Section 5604 (a) (1), Title 26, United States Code, which is as follows:

> (1) Any person who shall transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section — Shall be fined not more than $10,000, or imprisoned not more than 5 years for each such offense.

The constitutional provision involved in this appeal in U.S.C.A. Const. Amend. 4 which is as follows:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The defendant, Othell Campbell, was tried on a single indictment for violations of Section 5604 (a) (1), Title 26 of the United States Code. It was charged that on or about the 9th day of October, 1966, the defendant did wilfully and knowlingly possess a quantity of distilled spirits required to be stamped, the immediate containers thereof not having affixed thereto stamps as required by Chapter 51, Title 26, United States Code.

On April 19, 1967, the defendant unsuccessfully moved before the Honorable J. Robert Martin, Jr., to suppress as evidence any property seized on the night of the alleged offense at his premises by agents of the Alcohol and Tobacco Tax Division of the Internal Revenue Service of the United States, and to restrain the agents from testifying about the search and seizure.

At the hearing, defendant introduced into evidence a plat and deed proving ownership of the property, a schematic plat of the premises with definite distances indicated thereon, and photographs of the premises. Two witnesses, Arthur R. Echerd and L. J. Armstrong, testifed for the Government.

According to their testimony, at approximately 4:00 o'clock in the afternoon on the date of the alleged offense, the agents testified that the reason for their going to the premises of the defendant was based upon an accumulation of various bits of information that the defendant was handling liquor the first of the week on his premises. This testimony was objected to by the attorney for the defendant, and the objection was overruled.

The agents arrived at the premises at approximately 6:00 o'clock p.m. and stationed themselves in a cornpatch owned by the defendant and adjacent to and a part of the premises of his residence. That portion of defendant's residence and yard with which this action is concerned cannot be seen from the public roadway. Defendant's home and immediate premises are surrounded in a semi-circular fashion by a garage, a cultivated cornpatch, and a barn. There is a barbed-wire fence separating these structures and the cultivated area from an uncultivated wooded area owned by the defendant. The officers entered the premises from a paved roadway, came through a wooded area owned by the defendant, climbed over the barbed-wire fence onto defendant's cornpatch, and hid themselves at the edge of the cornpatch, approximately six to eight rows from the grassy area of the defendant's yard. There were no intervening barriers between the position of the officers and the defendant's residence.

An automobile entered the premises and the officers moved up to three or four rows from the edge of the cornpatch, at a point approximately fifty feet from defendant's house. It was dark and rainy. The driver of the automobile went into defendant's home. The defendant and another man appeared on the back screen porch, and the defendant handed the driver something. The officers could not observe the color or size of the object.

The three men then came out to the back of the automobile, which was parked in defendant's yard. The trunk lid of the automobile was opened. The defendant took a gallon jug from a cardboard carton in the trunk of the car, and the officers went to the rear of the car and arrested the defendant. The officers could not determine what was in the jug until after the arrest was made, when they opened the jug and found that it contained non-tax-paid whiskey.

The defendant was at all times in his home or only a few feet therefrom on his premises. He was at all times in a position where he could only be seen by an observer hidden on his property and on the defendant's premises in close proximity to his home.

The motion to supress made before the Hon. J. Robert Martin, Jr., was denied.

At the trial of the defendant before the Honorable Robert W. Hemphill on June 20, 1967, the same two witnesses testified for the Government. The officers again testified about information received by them prior to going to defendant's premises. An objection was made to this testimony and overruled. The witness, L. J. Armstrong, testified that when the automobile in question came into the yard of the defendant, the agents moved to the edge of defendant's yard. At the close of the testimony for the Government, the defendant renewed the motion to suppress upon the same grounds as those given before the Honorable J. Robert Mrtin, Jr., and defendant also moved for a judgment of acquittal.

All motions were denied and the petitioner was convicted and sentenced to three years imprisonment. Bond was set on appeal, and an appeal was taken in due course.

It has been conceded by the Government at all stages of the proceedings in this case that without the testimony of the agents concerning their surveillance conducted on defendant's property, there would be insufficient evidence to sustain a conviction.

The petitioner appealed to the United States Court of Appeals for the Fourth Circuit, and this appeal was decided against him on May 20, 1968.

REASONS FOR GRANTING THE WRIT

The appellate court below denied defendant the protection of the Fourth Amendment to the United States Constitution, upon the basis of a "constitutionally protected" area determination. The Court relied upon what is referred to as the "open field" doctrine.

This doctrine, developed by various federal courts, places primary emphasis upon the location or position of government agents in determining search and seizure questions. If the agents are found to be within the "curtilage" of defendant's home, a violation of the Fourth Amendment occurs. If the agents are outside the "curtilage", no violation occurs. The

appellate court below recognized that the search in question was the viewing by the government agents. Without giving any reason or basis the Court found the agents were not within the defendant's "curtilage". The Court then applied the "open field" doctrine.

Lower federal courts have based this doctrine on the general language contained in the case of *Hester v. United States*, 265 U.S. 57 (1924), that the protection of the Fourth Amendment "is not extended to the open fields". This general language has been used as the basis for the development of a mechanical doctrine whch totally disregards the fact that the Fourth Amendment protects people, not places.

The Fourth Circuit of Appeals' continued support of the "open field" doctrine and its application of that doctrine in this case is in direct conflict with this Court's holdings in the case of *Katz v. United States*, 389 U.S. 347 (1967). The language of *Katz* makes it clear that the Fourth Amendment protects people, not particular areas, and that the reach of its protection cannot be decided upon the basis of the presence or absence of an intrusion into a given enclosure. Yet, the court below based its decision entirely on the presence or absence of a physical intrusion into the "curtilage" of defendant's home.

In addition, the Court's application of the "curtilage" test to the facts of this case was so restricted as to deny the defendant or any other individual in and about his home the protection from Government intrusion guaranteed by the Fourth Amendment to the Unied States Constitution.

The Fourth Circuit Court of Appeals' determination that *Katz v. United States, supra,* does not affect the "open field" doctrine is in direct conflict with the opinion of the Ninth Circuit Court of Appeals in the case of *Wattenburg v. United States*, 388 F(2d) 853 (1968). This Circuit Court held that in the light of *Katz v. United States, supra,* the "curtilage" test was no longer the appropriate inquiry, and applied the rationale of the *Katz* case to the facts before it.

The Fourth Circuit Court of Appeals' decision sanctions the entry of government agents without an arrest or search

warrant upon private property for the admitted purpose of obtaining evidence upon which to base arrest and conviction. The only limitation imposed is that the agents must not cross into an area described as "curtilage", the bounds of which are decided case by case upon the basis of private property common law principles. The sanctity of the home and the right of privacy connected therewith is given no consideration. The continued application of the "open field" doctrine by lower federal courts requires a determination by this Court establishing the protection afforded by the Fourth Amendment to the United States Constitution to an individual in connection with his home and surrounding property and the degree of privacy one is entitled to expect in connection therewith.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,
ABRAMS, BOWEN AND TOWNES
By: Sol E. Abrams and Thomas W. Greene
Attorneys for the Petitioner
Greenville, South Carolina

May 28, 1968.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11, 584

United States of America,

Appellee,

Versus

Othell Campbell,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Robert W. Hemphill, District Judge.

Argued March 4, 1968 Decided May 20, 1968

Before Haynsworth, Chief Judge; Craven, Circuit Judge, and MacKenzie, District Judge.

Thomas W. Greene (Sol E. Abrams, and Abrams, Bowen and Townes on brief) for Appellant, and William B. Long, Jr., Assistant United States Attorney, (Klyde Robinson, United States Attorney, and Robert O. DuPre, Assistant United States Attorney, on brief) for Appellee.

FILED: May 20 1968—Samuel W. Phillips, Clerk

Per Curiam:

Convicted of possession of illicit whiskey, Othell Campbell has appealed, complaining that his motion to suppress evidence gained from an unlawful search and seizure should have been granted. The search in question was the viewing by Alcohol and Tobacco Tax Division agents from an adjacent cornfield of a transaction in illicit whiskey which took place in the backyard of Campbell's home. The agents were not within the curtilage and the "open field" doctrine is applicable to their observations. *Hester v. United States*, 265 U.S. 57; *United States v. Shue*, 4 Cir., 385 F. 2d 416; *McDowell v. United States*, 8 Cir., 383 F. 2d 599; *Rosencranz v. United States*, 1 Cir., 356 F. 2d 310; *United States v. Hassell*, 6 Cir., 336 F. 2d 684; *United States v. Young*, 4 Cir. 322 F. 2d 443; *United States v. Potts*, 6 Cir., 297 F. 2d 68; *Hodges v. United States*, 5 Cir., 243 F. 2d 281; *Care v. United States*, 10 Cir., 231 F 2d 22; *Janney v. United States*, 4 Cir., 206 F. 2d 601. Nothing said in *Katz v. United States*, 389 U.S. 347, requires a different result.

Affirmed.